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I am grateful for this opportunity to discuss the relationship between state tax policies and the dormant Commerce Clause. As someone who has written, taught and thought about that relationship, I am both surprised and pleased by the sudden interest in this subject. That interest reflects a variety of causes: the proliferation of state tax incentives; the growth of interstate telecommuting; several controversial court decisions on these subjects; a growing recognition that ultimately the Commerce Clause is a grant of authority to Congress and that, in an increasingly nationalized economy, that authority is likely to be invoked more and more frequently.

The most compelling conclusion I can share with you today is the importance of keeping separate three distinct concerns: the constitutionality of particular state tax policies, the economic wisdom of those policies, and the propriety of federal legislation.

Consider in the context of constitutionality two of the recent and more controversial dormant Commerce Clause

decisions, the decision of the Sixth Circuit in *Cuno*¹ and the decision of the New York Court of Appeals in my own case² challenging the constitutionality of New York's "convenience of the employer" doctrine for taxing nonresident telecommuters on the days they work at their out-of-state homes.

I suggest that both of these cases were decided wrongly. To take *Cuno* first, there is no principled basis for distinguishing the investment tax credit struck by the Sixth Circuit from other, routine tax and spending programs of state governments including the property tax relief which the appeals court sustained. The Sixth Circuit understands the dormant Commerce Clause as denying DaimlerChrysler an Ohio investment tax credit because of DaimlerChrysler's pre-existing Ohio plant but as permitting a credit for new investment to an otherwise identical competitor without an pre-existing facility in Ohio. In a similar vein, the *Cuno* decision indicates that if Ohio, instead of providing a tax credit, gives DaimlerChrysler a check equal in value to the credit, such a direct subsidy passes Commerce Clause muster

¹ *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th cir. 2004).

² *Zelinsky v. Tax Appeals Tribunal of the State of New York*, 1 N.Y.3d 85, 769 N.Y.S.2d 464 (2003), cert. den., 541 U.S. 1009 (2004).

even though an economically identical income tax credit does not.

These and other anomalies suggest to me that *Cuno* is doctrinally unsound.³

Equally troubling is the conclusion of the New York courts that, notwithstanding the Commerce and Due Process Clauses, New York can tax nonresidents such as me on the days we work at home. New York thus taxes me (as well as thousands of other telecommuters) on days we never set foot in New York. Most recently, the New York Court of Appeals upheld New York's income taxation of a telecommuter for the days he worked at home in Nashville, Tennessee.⁴ It strikes me and virtually all of the prominent commentators that New York, when it taxes thousands of nonresidents on days they work at their out-of-state homes, violates the rule of apportionment which, over the years, has become central to our understanding of the

³ For more detailed elaboration of these themes, see Edward A. Zelinsky, *Cuno v. DaimlerChrysler: A Critique*, 34 STATE TAX NOTES 37 (October 4, 2004), reprinted in 105 TAX NOTES 225 (October 11, 2004). For some pre-*Cuno* thoughts along these lines, see Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning The Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO NORTHERN UNIV. L. REV. 29 (2003).

⁴ *Huckaby v. Tax Appeals Tribunal*, 2005 N.Y. LEXIS 497 (March 29, 2005).

dormant Commerce Clause.⁵

It is important to distinguish the constitutionality of state tax policies from the wisdom of those policies. I have grave reservations, as a matter of constitutional law, about the *Cuno* decision. But I have equally grave reservations, as a matter of tax policy, about the kind of targeted tax incentives at issue in *Cuno*. There is much to commend tax competition benefitting taxpayers generally. The pressure to keep taxes reasonable and efficient for taxpayers in general imposes an important discipline on political decisionmakers and helps taxpayers and voters to monitor, compare and evaluate the performance of state and local governments.

On the other hand, I am skeptical of the kind of targeted tax incentives Ohio gave to DaimlerChrysler. I am doubtful of this kind of market-manipulating industrial policy whether pursued by the federal government, by pension trustees or by states and localities. In short, the fact that tax incentives are constitutional does not make them wise.

In contrast, New York's employer convenience doctrine is

⁵ See, e.g., Walter Hellerstein, *Reconsidering the Constitutionality of the "Convenience of the Employer" Doctrine*, 2003 STATE TAX NOTES TODAY 91-3 (May 12, 2003); Nicole Belson Goluboff, *Put The Telecommuter Tax Fairness Act in the Passing Lane*, 2004 STATE TAX NOTES TODAY 211-2 (October 6, 2004).

as unwise as it is unconstitutional. New York now taxes individuals throughout the nation when they work at home for New York employers. The reported cases indicate that New York has assessed nonresident income taxes against individuals working at home as far from New York as Maine, Florida, New Hampshire and South Carolina. At a time when we should be encouraging telecommuting, New York's overreaching, even if it were constitutional, is bad tax policy for the nation's economy.

There is, finally, the question when Congress should intervene, using its Commerce Clause authority to constrain state tax policies. Allow me to suggest three, nonexclusive criteria for congressional intervention: First, federal legislation under the Commerce Clause is particularly appropriate when states seek to export unfairly their tax burdens to nonvoters. As a Connecticut resident, I have no vote for or representation in the New York legislature. Since I have no political voice in the formation of New York's tax policies aimed at me, it is appropriate for Congress, where I am represented, to intervene on my behalf.

For that reason, I strongly support the legislation sponsored by Senator Dodd and Representative Shays, the Telecommuter Tax Fairness Act, which would preclude any state

from taxing a nonresident telecommuter on the day he works at home.

Second, Congress should exercise its Commerce Clause authority when conflicting tax policies impede the interstate mobility of persons, goods and services, thereby hindering the continental common market which is the U.S. economy. Again, I think the Dodd-Shays legislation satisfies this criterion also.

Finally, a state, in the name of federalism, should be permitted to pursue tax policies which impact solely within that single state. The Commerce Clause is not a barrier to a state implementing tax policies however misguided as long as those policies impact only within that state. For that reason, I am sympathetic to the effort to overturn *Cuno* legislatively even though I am unsympathetic to most state tax incentives.

Again, I appreciate the opportunity to discuss the relationship of state tax policy to the dormant Commerce Clause, a topic which will, with increasingly frequency, find itself on Congress' agenda in the years ahead.